STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket Number CUM-19-48

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE (CWALT 2005-07CB)

Appellant

v.

MICHAEL BUCK & DANIELLE SHONE

Appellees

ON APPEAL FROM CUMBERLAND COUNTY SUPERIOR COURT

Superior Court Docket Number PORSC-RE-15116

BRIEF FOR THE PLAINTIFF-APPELLANT

THE BANK OF NEW YORK MELLON

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STATEMENT OF FACTS

The Bank of New York Mellon f/k/a The Bank of New York as Trustee (CWALT 2005-07CB) (the "Plaintiff") commenced the instant action by way of Complaint dated June 26, 2015, to foreclose a mortgage given by Michael Buck and Danielle Shone (the "Defendants") to Mortgage Electronic Registration Systems, Inc. as nominee for America's Wholesale Lender dated January 28, 2005 to secure the payment of a promissory note by deed of said date in favor of America's Wholesale Lender. *See* Plaintiff's Appendix ("Appendix") at page 35. The Defendants have been in default on their obligations under the promissory note and mortgage since October 1, 2008. On April 24, 2015, a "Notice of Default" ("Notice") was sent by Plaintiff's counsel, Bendett & McHugh, P.C., on behalf of the Plaintiff to the Defendants. Despite extensive loss mitigation and settlement efforts, this case remains unresolved.

Trial in this matter was held on October 10, 2018. At trial, Plaintiff sought to enter into evidence Exhibit D: "Notice of Default"

through the testimony of its witness Mr. James D'Orlando, Litigation Manager, of Bayview Loan Servicing LLC ("Bayview"), a third party entity which services the Plaintiff's promissory note. Appendix, pg. 42. Mr. D'Orlando testified at length concerning the business practices Bayview employs in servicing Plaintiff's promissory note and, specifically, to the creation of the Notice and the integration of said Notice into its business records. *See* Transcript ("Tr.") pages 52-66.

Upon conclusion of Plaintiff's direct examination of Mr. D'Orlando, Defendants' counsel objected to the entry of Plaintiff's Exhibit D: "Notice of Default". The Court, ruling in Defendant's favor, determined that Mr. D'Orlando had failed to lay the necessary foundation for admission of the Notice due to Mr. D'Orlando's lack of sufficient personal knowledge of Bendett & McHugh, P.C.'s, record creation and record keeping practices. *See* Appendix pages 19-32. Having ruled Plaintiff's Exhibit D: "Notice of Default" inadmissible, the Court then ruled that the Plaintiff could not establish compliance with the notice requirements of 14 M.R.S. § 6111. Accordingly, the Court entered judgment for the Defendants. *See* Appendix at page 16.

On October 20, 2018, Plaintiff filed a Motion to Alter or Amend the Judgment and for a New Trial arguing that Plaintiff's witness did in fact properly lay the foundation for the entry of Plaintiff's Exhibit D: "Notice of Default". *See* Appendix at page 63. The Trial Court denied Plaintiff's Motion, stating that "[i]t is not enough to establish that the law firm's notice of default was properly integrated into the mortgage lender or servicer's records. . . . In this case the Bayview servicing witness was aware that Bayview audited the law firm's practices but did not himself have personal knowledge of the law firm's practices in generating and mailing notices of defaults." *See* Appendix at page 33.

This appeal followed.

STATEMENT OF THE ISSUES

1. Whether Plaintiff's witness possessed sufficient personal knowledge, and was thus qualified to lay the foundation necessary, for admission into evidence Plaintiff's Exhibit D: "Notice of Default" and otherwise satisfy the business records exception to the rule against hearsay, Maine Rule of Evidence 803(6); and
2. Whether the Trial Court correctly relied upon the case of *Deutsche Bank National Trust Co. v. Eddins*, 2018 ME 47, 182 A.3d 1241 to exclude Plaintiff's Exhibit D: "Notice of Default" when the testimony presented in this case differs significantly from that in *Eddins*.

ARGUMENT

The Trial Court incorrectly determined that Plaintiff's witness, Mr. James D'Orlando, lacked sufficient personal knowledge and was thus not qualified to lay the foundation for admission of Plaintiff's Exhibit D "Notice of Default". The Trial Court further erred in basing its determination on the case of *Deutsche Bank Nat'l Trust Co. v. Eddins*, 2018 ME 47, 182 A.3d 1241, as the facts of *Eddins* are inapposite to the case at bar. Therefore, the judgment in favor of the Defendants should be reversed.

A. Standard of Review

The standard of review in this case is clear error, and the ultimate decision to either admit or exclude evidence is reviewed for an abuse of discretion. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶25, 96 A.3d 700. When "making foundational findings, the court may only consider evidence established prior to the exhibit's admission into evidence." *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶ 2, 122 A.3d 947.

B. Plaintiff's witness, Mr. James D'Orlando of Bayview Loan Servicing, is a witness qualified to lay the foundation for Plaintiff's Exhibit D: "Notice of Default" pursuant to M.R. Evid. 803(6)(D).

The Trial Court erred when it found that Mr. James D'Orlando was not sufficiently qualified as a witness to lay the foundation for admission of Plaintiff's Exhibit D: "Notice of Default". Pursuant to the business records exception rule provided by M.R. Evid. 803(6), the proponent of a business record must establish:

> (A) The record was made at or near the time by--or from information transmitted by--someone with knowledge;
> (B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) Making the record was a regular practice of that activity;
> (D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11), Rule 902(12) or with a statute permitting certification; and
> (E) Neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

Without requiring firsthand testimony regarding the recorded facts, a party may satisfy the requirements of M.R.Evid. 803(6) by "offering a witness with knowledge of the business practices for production and retention of the record sufficient to ensure the reliability and trustworthiness of the record." *Beneficial Maine Inc.*

v. Carter, 2011 ME 77, ¶ 12, 25 A.3d 96[1]; *JPMorgan Chase Co., NA, v. Lowell*, 2017 ME 32, ¶ 11, 156 A.3d 727; *see also Deutsche Bank Nat'l Trust Co. v. Eddins*, 2018 ME 47, ¶11, 182 A.3d 1241 ("The witness who testifies to the predicate for the admission of a business record need not have personal knowledge about the matter that is memorialized in the document, because the foundational elements of a Rule 803(6) business record, by themselves, provide sufficient indication that the information contained in the record is reliable and trustworthy").

In the instant case, Plaintiff's promissory note servicer, Bayview Loan Servicer, did not produce the Notice but, rather, integrated the business record produced by Bendett & McHugh, P.C., into its own business records. This Court established, in *Beneficial Maine Inc. v. Carter, supra*, the criteria that must be satisfied by the proponent of the business records when a party seeks to admit integrated business records, as is the case here.

To qualify as a witness to admit integrated business records,

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[1] The *Carter* Court cited to *United States v. Pfeiffer*, 539 F.2d 668, 671 (8th Cir. 1976) ("The reason for excluding business records from the hearsay rule is their circumstantial guarantee of trustworthiness. It is not necessary under the new federal rules of evidence that the declarant be present if the knowledge of the custodian of the record demonstrates that a document has been prepared and kept in the course of a regularly conducted business activity.")

pursuant to M.R. Evid. 803(6)(D), the witness must have knowledge that: (1) the producer of the record at issue employed regular business practices for creating and maintaining the records that were sufficiently accepted by the receiving business to allow reliance on the records by the receiving business; (2) the producer of the record at issue employed regular business practices for transmitting them to the receiving business; (3) by manual or electronic processes, the receiving business integrated the records into its own records and maintained them through regular business processes; (4) the record at issue was, in fact, among the receiving business's own records; (5) and the receiving business relied on these records in its day-to-day operations. *Id.*, ¶14; *see also KeyBank Nat'l Ass'n v. Estate of Quint,* 2017 ME 237, ¶16, 176 A.3d 717.

Repeatedly, the Trial Court stated that Mr. D'Orlando, testifying that his responsibilities at Bayview Loan Servicing included that of liaison between Bayview and Bendett & McHugh, satisfied all of the criteria set forth in M.R.Evid. 803(6), *Carter* and *Quint, supra* to be a witness qualified to lay the foundation for Plaintiff's Exhibit D: "Notice to Quit" – *save for one*: the level of

personal knowledge of the business practices employed by Bendett & McHugh, P.C. in its creation and retention of the "Notice to Quit" the Trial Court perceives is necessary to satisfy the criteria. Quoting the Trial Court:

> Let me just say that I think [Plaintiff's attorney] Mr. Birkenmeier's done a valiant job of establishing everything but one thing, and that is that this witness has personal knowledge of the record creating and keeping practices of Bendett & McHugh. *See* Tr. pg. 73, lines 11-15.
>
> And I also think this witness has adequately established that the information that goes to Bendett & McHugh is correct information, and that it's double-checked when it comes back to make sure it's correct information. *See* Tr. pg. 73, lines 22-25.
>
> [I] think [Plaintiff's counsel] Mr. Birkenmeier, notwithstanding a valiant effort to -- that establishes most of the elements here, has not established that Mr. D'Orlando, who is a knowledgeable person and I'm sure knows a lot about making sure that these letters are correct and that they end up correctly in the file, but that he doesn't know exactly the creation, recordkeeping, and mailing processes at Bendett & McHugh, which is I'm afraid what I think you need[.] *See* Tr., pg. 74, lines 18-25.
>
> [...] I thought you covered -- of what looks like seven bases the law court wants covered, I think you covered six of them. *See* Tr., pg. 79, lines 2-4.

The purpose of the business records exception to the rule

against hearsay is "to allow the consideration of a business record, without requiring firsthand testimony regarding the recorded facts, by ***supplying a witness whose knowledge of business practices for production and retention of the record is sufficient to ensure the reliability and trustworthiness of the record.***" [Emphasis added] *Beneficial Maine Inc. v. Carter*, 2011 ME 77, ¶ 12, 25 A.3d 96[2]; *see also JPMorgan Chase Co., NA, v. Lowell*, 2017 ME 32, ¶ 11, 156 A.3d 727.

The testimony provided by Plaintiff's witness, Mr. D'Orlando, is unequivocally sufficient to ensure the reliability and trustworthiness of the record in question. Satisfaction of the criteria set forth in *Carter* and *Quint, supra* to be a witness qualified to lay the foundation for Plaintiff's Exhibit D: "Notice of Default", are addressed in turn.

1) the producer of the record at issue employed regular business practices for creating and maintaining the records that were sufficiently accepted by the receiving business to allow reliance on the records by the receiving business

[2] The *Carter* Court cited to *United States v. Pfeiffer*, 539 F.2d 668, 671 (8th Cir. 1976) ("The reason for excluding business records from the hearsay rule is their circumstantial guarantee of trustworthiness. It is not necessary under the new federal rules of evidence that the declarant be present if the knowledge of the custodian of the record demonstrates that a document has been prepared and kept in the course of a regularly conducted business activity.")

Mr. D'Orlando testified that it is a regular business practice at Bayview for law firms to send a "Notice of Default" on its behalf. *See* Tr. pg. 52-53, lines 25-3. He further testified that Bayview provides the law firm with the principal, interest, and other fees associated with the loan (Tr. pg. 55, lines 4-6); that the firm drafts the Notice for Bayview (Tr. pg. 57, lines 15-16); and that it is Bayview's practice to review the contents of the Notice to be sent and ensures that it is sent both certified and regular mail (Tr. pg. 61, lines 1-8.) He testified that Bayview visits the office of Bendett & McHugh and accesses the recordkeeping system of the law firm. (Tr. pg. 59, lines 6-16). He testified as to the business practices of Bayview with respect to the Notice – that they ensure that the Notice is sent both certified and regular mail, and that the unpaid balance, interest, escrows, and other fees are correct. (Tr. pg. 61, lines 1-8.) Therefore, Mr. D'Orlando demonstrated knowledge of how Bendett & McHugh employs regular business practices for creating and maintaining the records, and that Bayview accepts and even regularly audits Bendett & McHugh for these processes.

2) the producer of the record at issue employed regular business practices for transmitting them to the

receiving business

Mr. D'Orlando testified to the regular business practice employed for transmitting the Notice created by Bendett & McHugh to Bayview; testified that the firm provides a copy of the Notice that gets uploaded into Bayview's system (Tr. pg. 57, lines 16-17); that the Notice becomes part of Bayview's business records. (Tr. pg. 57, line 18); that Bayview has strict requirements for how the Notice is uploaded from Bendett & McHugh to Bayview (Tr. pg. 63, lines 22-24); that, upon receipt of the Notice sent by the law firm, the Notice is reviewed for accuracy and then confirmed that it is uploaded into Bayview's system by the foreclosure coordinator (Tr. pg. 64, lines 9-14.) In these ways, Plaintiff's witness testified as to his knowledge regarding the business practices for transmitting the Notice from Bendett & McHugh to Bayview.

3) by manual or electronic processes, the receiving business integrated the records into its own records and maintained them through regular business processes

Mr. D'Orlando testified that the Notice is integrated into and becomes part of Bayview's business records for the loan (Tr. pg. 64, lines 15-18); that the Notice drafted, sent and uploaded by the law

firm "becomes a part of our records moving forward" (Tr. pg. 57, line 18); and that Bayview maintains the records with regular audits for compliance of procedures for Notices. (Tr. pg. 58, lines 1-18.)

4) the record at issue was, in fact, among the receiving business's own records

Mr. D'Orlando specifically testified that Plaintiff's Exhibit D, a copy of the Notice, is part of Bayview's business records for the subject loan. (Tr. pg. 57, line 13.)

5) the receiving business relied on these records in its day-to-day operations

Plaintiff's witness testified that Bayview specifically relies on the Notice sent by Bendett & McHugh for its accuracy in its day-to-day business practices. (Tr. pg. 64, lines 19-21.)

It is clear that Plaintiff's witness, Mr. D'Orlando, testified as to his knowledge and familiarity sufficient to lay the foundation for admission of Bayview's integrated business record, Plaintiff's Exhibit D: "Notice of Default" as required by M.R. Evid. 803(6), and as set forth in *Carter* and *Quint, supra*.

Yet, despite finding that Plaintiff's witness overwhelmingly satisfied each of these requirements - and the Trial Court acknowledging that each of these requirements has been satisfied -

the Trial Court erred in this case by excluding Plaintiff's Exhibit D: "Notice of Default" and, in doing so, it has created a new and extraordinarily high bar for what knowledge is necessary to qualify a witness pursuant to M.R. Evid. 803(6)(D).

In error, the Trial Court ruled that, to possess knowledge and familiarity of an organizations business practices sufficient to lay the foundation for admission of integrated business record, a qualified witness must have personally, while physically on site, witnessed the performance of clerical work:

> [H]e doesn't personally say, I go to – I've been to Bendett & McHugh and I've watched how they mail things, I've watched the paralegals attach the certificates of mailing to the letters, I've watched the letters go down the chute, I've watched them be printed, and I've watched them then be uploaded to my firm. And I think that's what he needs to say if he's not an employee of Bendett & McHugh. *See* Tr., pg. 75, lines 6-13.

> [I] think Eddins suggested that you need a witness from your firm, that you need the mail clerk from your firm, or wherever, who may be located, it looks like – and this makes it very difficult, but this is part of the problem that's happened with mortgages. And if you've read Justice Alexander's decisions, he keeps complaining about the fact that people have securitized these mortgages and have turned them into commodities and have dealt with them in a bureaucratic fashion; that you need a mail clerk from – and maybe even a mail clerk from Connecticut, because it looks like this firm [sic] was mailed in Connecticut – this letter was mailed in

Connecticut. Tr., pg. 75, line 3 to Tr., pg. 76, line 3.

Now, you may have a mail clerk who's familiar with the process. I don't think someone has to say, I mailed it, but I think someone has to say, I have watched the Bendett & McHugh mailing process, I am familiar with how it works, I have watched the letter from beginning to end, I see where the information comes in from the bank, I see where the information is put in the letter, I know how they're mailed. I know how they're printed, I know who Lindsey Allen is, or the kind of person who electronically signs them, I know how they're mailed, I know how the certificate of mailing is attached to them, and then they are uploaded back to Bayview.

[T]hat may mean someone from Bayview could go and spend two weeks or a week or even two days at Bendett & McHugh and be taken through the process, and say, I'm now familiar with it. But until something like that happens, I don't think someone other than a Bendett & McHugh person can testify to it. *See* Tr., pg. 77, lines 2-7.

[...] I'm agreeing that he [Mr. D'Orlando] knows that his procedures -- or Bayview's assure that the information in the letter is correct from Bayview's point of view [-- the content --] but we have to make sure the letter was in fact, mailed. *See* Tr., pg. 78, lines 10-17.

[...] I thought you covered -- of what looks like seven bases the law court wants covered, I think you covered six of them. And I don't think what Mr. D'Orlando, as competent and as knowledgeable as he is about Bayview's practices and about the general relationship between Bendett & McHugh, can [say] he has personal knowledge of watching Bendett & McHugh send out letters and watching them get transmitted, handed around through the Bendett process, and eventually then put in in an upload manner. And we can assume that it

> looks like they're done correctly, and we can assume that his entity does a good job of checking to make sure that the information once sent out is what they wanted sent out [...] but I didn't hear him say I've personally observed the Bendett & McHugh process of creation, mailing, and noting the dates and times of mailing, and then uploading it back to us. *See* Tr., pg. 79, lines 1-20.

The purpose of the requirements created by M.R.Evid. 803(6) and *Carter* and *Quint, supra*, is to ensure the reliability and trustworthiness of the record in question. A standard which would require an individual to have personally, while physically on site, witnessed the performance of clerical work to qualify as a witness under M.R.Evid. 803(6)(D) is neither practicable nor necessary to sufficiently ensure the reliability and trustworthiness of the record in question. Such a high standard, in almost all cases, would effectively create a burden sufficient to eliminate the ability to qualify any witness other than the custodian of record, and create a burden significant enough to prohibit the entry of any integrated business record other than through testimony, or by certification, of the custodian of record.

Even in instances where a qualified witness may exist - that, being, an individual who had physically visited another business

and witnessed clerical work relevant to the integrated business records in question - such a high standard would make it nearly impossible to substitute witnesses should the need arise. Such a high standard would also effectively create a burden sufficient to dissuade economic activity and business dealings with parties who could not reasonably visit each other's physical locations to witness the production of clerical work relevant to the integrated business records in question.

Thus, the Trial Court erred in its ruling and it is incumbent upon the Law Court to overturn this new and unnecessary standard.

Ostensibly, this new standard imposed by the Trial Court is meant to ensure the reliability and trustworthiness of the record in question. Yet, the Court did not identify any issue with the documents reliability or trustworthiness and never once indicated that Plaintiff's Exhibit D: "Notice of Default" lacked trustworthiness. *See* M.R. Evid. 803(6)(E) ("[n]either the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.")

Indeed, had reliability and trustworthiness been in question,

Defendants bore the burden of indicating so and failed to make any such suggestion. Federal Rule of Evidence 803(6) was amended in 2014

> to clarify that if the proponent has established the stated requirements of the exception. . . .then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. . . .It is appropriate to impose this burden on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable.

Committee Notes to Fed. R. Evid. 803(6).

Defendants did not provide – and cannot provide - any evidence or explanation as to why the "Notice of Default" should be considered untrustworthy. At no point did the Defendants deny that they had received the "Notice of Default". Plaintiff's witness established that the Notice was reliable. The reliability of business records is based "on the systematic businesslike way they are kept." *State v. Tomah*, 1999 ME 109, ¶ 9, 736 A.2d 1047, *citing* Field & Murray, Maine Evidence § 803.6 at 433 (4th ed. 1997).

> In evaluating trustworthiness for purposes of Rule 803(6), courts consider factors such as the existence of any motive or opportunity to create an inaccurate record, any delays in preparation of the record, the nature of the recorded information, "the systematic checking, regularity and continuity in maintaining the records[,]

> and the business'[s] reliance on them." [internal citation omitted]

HSBC Mortg. Servs. v. Murphy, 2011 ME 59, ¶ 11, 19 A.3d 815. Mr. D'Orlando testified in this case that the Notice is trustworthy because, as explained above, he satisfied the business records exception for the Notice's admissibility. There is nothing in the record to indicate the existence of any motive or opportunity to create an inaccurate record. There is nothing in the record to indicate that there were delays in preparation of the record. Rather, Plaintiff's witness testified at length to the systemic audits which Plaintiff's servicer employs to ensure the reliability and accuracy of the records of the Notice. *See* Tr. pgs. 57-58. No indication of a lack of trustworthiness exists.

As such, the Court erred when it determined that the Notice was inadmissible.

Finally, in its Order entering judgment for Defendants, the Trial Court noted that Plaintiff was required to "turn square corners when dealing with the Government", citing *Rock Island Arkansas & Louisiana Railroad Co. v. United States*, 254 U.S. 141, 143 (1920). *See* App. at 16. The present case is distinguishable from *Rock*

Island, A. & L.R. Co., in that it does not involve taxes, government entities, nor strict statutory requirements.

Still, the Federal Rules of Evidence likewise do not have a requirement that the business record be authenticated by a person with personal knowledge. *See* Fed. R. Evid. 803(6); *see also* Field & Murray, Maine Evidence at 430 (2000 ed.) ("The Federal Rule is substantively the same as the Maine Rule with respect to subparts 1-7 . . . ."). Rather, the Federal Rules establish that "the witness need not be the person who actually prepared the record. A qualified witness is simply one who can explain and be cross-examined concerning the manner in which the records are made and kept." *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, 780 F.2d 1049, 1061 (1st Cir. 1985) (internal citations omitted); *see also United States v. Kayne*, 90 F.3d 7, 12-13 (1st Cir. 1996) (citing to *Wallace* that qualifying witness need not have actually prepared the business record, just that he can be cross-examined on the matter of how record was made and kept).

It is clear that, in the instant case, Plaintiff has turned each corner, squarely, and has complied with the Maine Rules of Evidence. For these reasons, the Trial Court, in denying the entry

of Plaintiff's Exhibit D: "Notice of Default", the foundation for which was established by Plaintiff's qualified witness, Mr. D'Orlando, and for which no issue as to the sufficiency of its reliability and trustworthiness exists, has ruled in error.

C. The *Eddins* case upon which the Trial Court relied is irrelevant to the case at bar.

The Trial Court erred in basing its determination to exclude Plaintiff's Exhibit D: "Notice of Default" and by denying Plaintiff's Motion to Alter or Amend on the case of *Deutsche Bank National Association v. Eddins*, 2018 ME 47, 182 A.3d 1241.[3] In its decision denying Plaintiff's Motion to Alter or Amend and for a New Trial, the Trial Court stated the issue in that case was similar to the issue in this case – that of the admissibility of a mortgagee's "Notice of Default" sent by the mortgagee's law firm via testimony from a witness from the loan servicer.

However, the circumstances which kept the "Notice of Default" out of evidence in *Eddins* are not present in this matter and the

[3] *See* Appendix at 22 (Court describing what it believed to be required under *Eddins*); *see also* Trial Court's Order denying Plaintiff's Motion to Alter or Amend, Appendix at pg. 33.

Eddins case does not provide any guidance for this case. In *Eddins*, this Court reversed the trial court's decision to admit the "Notice of Default" sent by the mortgagee's law firm. The witness in *Eddins* was not qualified to lay the foundation for the "Notice of Default" because:

> Deutsche Bank presented Shadle as the witness to provide the foundational predicate for admission in evidence of the notice of default. Shadle testified about various positions he held with Ocwen and described some measure of familiarity with Ocwen's business practices. The notice of default, however, was not issued by Ocwen. Rather, the notice was issued and at least initially maintained by the law firm representing Ocwen. Deutsche Bank did not present *any* evidence that Shadle had *any* familiarity with the processes used by the law firm to generate documents, such as a notice of default, and to maintain any such documents.

[Emphasis in original] *Id.*, ¶13. This Court concluded that "[i]n the absence of any evidence that [the witness] had knowledge of the law firm's practices regarding business records, the court abused its discretion by admitting the document in evidence." *Id.*, ¶14. In *Eddins*, the offered witness was unable to testify as to *any* steps taken to create, send, and maintain the record of the "Notice of Default".

Similarly, the instant case may be distinguished from *M & T Bank v. Plaisted*, 2018 ME 121, 192 A.3d 601, 605. There, like here, the only witness at trial was a litigation manager for Bayview Loan Servicing who testified that Plaisted's loan had two servicers: Bayview Loan Servicing and M & T Bank.

> "The litigation manager claimed that he was a custodian of records for M & T Bank, but he did not provide any testimony demonstrating that he had firsthand knowledge of M & T Bank's business practices. In fact, he testified that he had never spoken with anyone from M & T Bank and did not know where M & T Bank is located." *Id.*, at ¶24. Similarly, "he did not testify to personal knowledge of the business practices that occurred on site at M & T Bank, such as whether entries into the loan records through the servicing platform are made at or near the time of the events or whether the records are transmitted by a person with personal knowledge of the events."

Id. at ¶24. Here, unlike the witness in *Eddins* or *Plaisted*, Mr. D'Orlando made clear that Plaintiff's law firm, Bendett & McHugh, is required to utilize and comply with business practices required and created by Bayview and that Bayview audits Bendett & McHugh to ensure full and proper implementation of those business practices.

Mr. D'Orlando did not testify as to "some measure of familiarity" of the manner in which Plaintiff's law firm created and

maintained the Notice but, rather, explicitly to Bayview's business practices in creating the Notice. Mr. D'Orlando's testimony shows that Bayview Loan Servicing, LLC – not Bendett & McHugh – develops and implements the procedures for creation and maintenance, which Bendett & McHugh complies with to generate the Notice. Mr. D'Orlando testified that it is a regular business practice at Bayview for law firms to send Notices on its behalf. *See* Tr. pg. 52-53, lines 25-3. He testified that Bayview provides the figures for the Notice (Tr. pg. 55, lines 4-6); that the firm provides a copy of the Notice that gets uploaded into Bayview's system (Tr. pg. 57, lines 16-17); that Bayview has strict requirements for how the Notice is uploaded from Bendett & McHugh to Bayview (Tr. pg. 63, lines 22-24); and that Bendett & McHugh is rigorously audited to ensure accuracy and compliance with Bayview's business procedures and requirements. *See* Tr. pages 58-61.

In its decision denying Plaintiff's Motion to Alter or Amend and for a New Trial, the Trial Court stated that "[w]hen a business integrates and relies upon the records of another business in that business's day-to-day operations, the presenting witness must have 'sufficient knowledge of *both businesses'* regular practices to

demonstrate the reliability and trustworthiness of the information'", citing *KeyBank Nat'l Ass'n v. Estate of Quint*, 2017 ME 237, ¶15, 176 A.3d 717. *See* Appendix at pg. 33. This statement of the law simply does not preclude admission of the Notice in this case.

As this case stands in stark contrast to *Eddins*, the Trial Court should be reversed to the extent that that it relied on said case to prevent admission of Plaintiff's Notice into evidence and denied Plaintiff's Motion to Alter or Amend and for a New Trial.

CONCLUSION

The Trial Court conflated "turning square corners" with imposing additional, unnecessary, and arduous requirements to M.R. Evid. 803(6) which do not exist. For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the decision of the Trial Court to preclude admission of Plaintiff's Exhibit D: "Notice of Default" and remand for further proceedings.

Respectfully submitted,

PLAINTIFF

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE (CWALT 2005-07CB)

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